No. 93-643

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

WHEELING-PITTSBURGH STEEL CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS TOLEDO WORLD TERMINAL, INC. AND WILLS TRUCKING, INC.

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Respondents Toledo World Terminal, Inc. ("Wills dock") and Wills Trucking, Inc. (collectively "Wills respondents") submit this supplemental brief as directed by Supreme Court Order dated Monday, December 13, 1993, to address the impact of settlements made by Petitioner Bessemer & Lake Erie Railroad Company ("B&LE") with Republic Steel Corporation (D.C. Civil No. 84-02079) and Jones & Laughlin Steel Inc. (D.C. Civil No. 84-02135) on the questions presented for a writ of certiorari. Furthermore, B&LE has since settled with C.D. Ambrosia Trucking Company (D.C. Civil No. 84-02012) and Erie-Western Port Authority and Codan Corporation ("Erie-Codan"; D.C. Civil No. 84-05760), and this supplemental brief also addresses the impact of the more recent settlements.

Petitioner B&LE presented only the *Keogh*[1] question for review in relation to the Wills respondents' case.

[1] *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922).

B&LE raises the issues of whether *Keogh* is applicable under two situations—1) "where tariff rates are the primary . . . means of precluding market entry by competitors, and [2)] where competitors of the defendant, rather than shippers, are the antitrust plaintiffs." Pet. (i). Wills respondents are competitors to the railroads for dock-handling services and for the inland trucking of ore. However, B&LE's "competitor" arguments are only relevant if there is a rate-based injury that would otherwise be barred under the *Keogh* doctrine. Settlement of the Erie-Codan dock case removed the guise of "rate-relatedness" relied upon by B&LE, making its competitor arguments wholly insupportable under the facts remaining before the Court.

Dock Competitors

B&LE's claim that the decision below "unquestionably conflicts with the Sixth Circuit's holding in *Pinney Dock* [2] on identical facts" (Pet. 9) rested exclusively on the allegations, trial evidence, and special jury verdict applicable to the Erie-Codan dock case. Settlement of the Erie-Codan dock case removed any "conflict," and thus removed the core reason B&LE requested review of the Third Circuit's application of the *Keogh* doctrine.

The Erie-Codan Complaint presented the allegation that B&LE and its co-conspirators had "conspired to maintain unjustifiably high rates for the transportation of iron ore." [3] Erie-Codan presented evidence at trial that established the railroads' concerted refusal to provide a competitive rail service from its dock,[4] which resulted in a liability jury verdict finding Erie-Codan's injury to have been caused, in part, from B&LE's actions "to prevent Erie from having competitive iron ore rates at the Erie ore dock[.]" C.A. App. 1987. These facts are no longer before the Court. In contrast, the Wills dock case (the

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[2] *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir. 1988), *cert. denied*, 488 U.S. 880 (1988).

[3] *See* C.A. App. 189 ¶ 49.

[4] *See* Erie-Codan Br. in Opp. 5 and referencing C.A. App. 6527, 6535, 6876, 6895, 7994 and 8256.

only remaining dock case) alleged, established at trial, and received a jury verdict specifically finding injury caused solely through "the refusal to lease or sell dock properties or the refusal to lease or sell dock properties without restrictions, to prevent Wills from engaging in an iron ore business at Toledo, Ohio." C.A. App. 443, 3437-60, and 1900, respectively.

The Sixth Circuit, in *Pinney Dock,* recognized that allegations of the railroads' refusal to extend commodity line-haul rates were clearly distinguishable from allegations of the railroads' concerted refusal to sell or lease dock properties. The Sixth Circuit found *Keogh* an applicable bar to claims having been caused by the railroads "refusing to grant nonrailroad owned docks, such as Pinney, a competitive rail rate (i.e., a commodity line-haul rate) . . ." but also clearly recognized that *Keogh* did not apply to the railroads' non-rate-related activities, holding "that the defendants' refus[al] to permit Litton to purchase, lease or use dock facilities" was "outside the scope of the *Keogh* doctrine." *Pinney Dock* at 1457. Wills' injuries resulted from the railroads' "refusal to lease or sell dock properties," and therefore, *Pinney Dock* and the Wills dock case uniformly find that concerted refusals to sell or lease dock properties constitute non-rate activities well outside the scope of the *Keogh* doctrine, and settlement of the Erie-Codan dock case removes B&LE's ability to camouflage the complete uniformity of *Pinney Dock* with the only dock case remaining before the Court.

Unlike Erie-Codan, the docks Wills attempted to lease or purchase had the commodity line-haul rate, not the class rate, making the concerted refusal to permit the lease or purchase of the dock properities crucial to the success of the conspiracy's goals—i.e., thwarting competition. Wills' Br. in Opp. 5-7. Despite the variance in methods used by the railroads to inflict injury on the Erie-Codan and Wills respondents, Petitioner B&LE repeatedly characterizes all private dock claims as having been based on the refusal to extend commodity line-haul rates, and thus forcing private docks to pay the higher, less competitive,

class rate. Pet. 4, 5, 6, 9, 11, 14 n.9, 15. *Settlement of the Erie-Codan case leaves B&LE with no factual basis for its argument.*

B&LE unambiguously admitted that the Wills respondents' claims were not of a rate-related nature in the Third Circuit Court of Appeals below. B&LE App. Br. 14. Further, B&LE's reply brief to this Court likewise admits the Wills respondents' claims are outside the scope of *Keogh*.[5] Once B&LE's arguments pertaining to the Erie-Codan facts are stripped from its brief, B&LE is left without any rate-related facts to support its *Keogh* argument.

Trucking Competitors

B&LE argues that the "competitor's rate-based claims" were the "primary," "core," and "dominant" means of causing injury to the competitor respondents. Pet. 10, i, 5, 9, respectively. However, the entire record contains not one example of a rate-based claim alleged by a trucking competitor. In fact, B&LE never mentions trucking claims in its analysis of "competitor" claims. *See* Pet. 16-18. Instead, B&LE argues only that this Court previously ruled "that *Keogh* also applied to the State's parens patriae claim on behalf of its ports, which, like the dock plaintiffs here, claimed that filed rates caused them injury . . ." Pet.

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[5] B&LE Reply Br. n.1 states: "Of course, the disposition of the Wills' claims proves Petitioner's argument that rates were the sole means of injuring respondents: Wills claimed injury only from the railroads' refusal to sell or lease dock property, and the jury awarded Wills only one dollar." B&LE again admits in a backhanded way that the Wills respondents' claims are not rate-related, yet, B&LE continues to seek review of the Wills respondents' case solely on the theory that its claims are rate-related and thus barred by the *Keogh* doctrine. Furthermore, B&LE's opening brief sets forth the three "nefarious means" used to carry out the conspiracy, the third being the railroads "concertedly refusing to make dock property available for use by private docks." Pet. 11 and quoting the Third Circuit Court of Appeal's opinion at 998 F.2d at 1168. B&LE indirectly admits the third means—the refusal to sell or lease dock property—is not a rate-related activity by stating: "The first two of these 'means' indisputably involved the rates filed in tariffs with the ICC." Pet. 11.

16-17. Here again, B&LE relies exclusively on Erie-Codan facts to make its argument. In the absence of Erie-Codan, B&LE's "competitor rate-based claims" argument is a hollow shell. There is not one aspect of rate-based activity remaining before the Court.

B&LE never created a factual record in regard to trucking claims from which to make an argument in support of the competitor issue it presents. Wills Trucking, Inc. established at trial that it had the authorities (C.A. App. 3464-69, 6436, 10444, 7152-53, 6649-50, 7710-12, 7716-31, 7888-7906, 7794-7824), and the rates (C.A. App. 7475-79) to move Armco's ore. B&LE never refuted or contradicted this evidence in any way, and now has attempted to sweep all "competitors" into the rate-related facts of the Erie-Codan dock case.

CONCLUSION

B&LE did not address its *Illinois Brick* argument to the Wills respondents, and settlement of the Erie-Codan case leaves B&LE with no basis for its claim that the decision below "conflicts with the Sixth Circuit's holding in *Pinney Dock* on identical facts . . ." (Pet. 9), thus removing its main reason for seeking review of the Third Circuit's application of the *Keogh* doctrine. B&LE's "competitor" argument simply no longer exists without the Erie-Codan dock case before the Court. For these reasons, B&LE's Petition for Certiorari should be denied.

Respectfully submitted,

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